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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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KARA KENNEY  
*Complainant,*

v.

OFFICE OF THE GOVERNOR  
*Respondent.*

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Formal Complaint No.  
21-FC-15

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Governor violated the Access to Public Records Act.<sup>1</sup> General Counsel Joseph R. Heerens, filed an answer on behalf of the Governor's Office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 28, 2021.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to records related to the early days of the public health emergency declared in Indiana.

On April 1, 2020, Kara Kenney (Complainant), a reporter with WRTV, filed a public records request with the Governor's Office requesting emails between Governor Eric Holcomb and State Health Commissioner Dr. Kristina Box for a period of approximately three months with the keywords: "coronavirus," "COVID19," "COVID-19," and "pandemic."

The Governor's Office acknowledged Kenney's on that same day.

On December 31, 2020, Kenney received the totality of the responsive emails, six emails in sum. The response from the Governor's Office implied some emails may have been withheld. On January 28, 2021, Kenney filed a formal complaint with this office. Kenney contends she should have received at least portions of the other records. She also takes exception with the amount of time it took for the response.

For its part, the Governor's Office responded to the complaint by contending only a single email was withheld from the yield. This was largely based on the in-person interaction between Dr. Box and Governor Holcomb during the early days of the public health emergency. Emails were largely unnecessary as communication was face-to-face in real time; this was especially so once the daily COVID briefings began in April.

As for the timeliness issue, the Governor’s Office cites the pandemic itself – and the burden it placed on staff – as the reason for the delay.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Office of the Governor is a public agency for purposes of APRA; and therefore, subject to the law’s requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the Office’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a); –(b). This case largely involves APRA’s deliberative materials exception.

### 2. Deliberative materials exception

Under APRA, deliberative material includes records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

In order to withhold a public record from disclosure under Indiana Code section 5-14-3-4(b)(6), the documents must be interagency or intra-agency records of advisory or deliberative material and are also expressions of opinion or speculative in nature.

### **2.1 Kenney's request**

As an initial matter, it is worth mentioning that this office has been the subject of news interviews with the complainant regarding this issue. The public access counselor has operated under the presumption that emails between executive branch leadership were likely to be few and far between. This is based on experience working with many in the Governor's Office's legal team and other agency heads and legal counsel. When major events happen, we tend to speak telephonically or in-person to triage issues in real time. As convenient as email can be, there is no substitute for instantaneous dialogue and face-to-face interaction.

Toward that end, this office has projected that presumption on the current case as well. The Governor's Office's response has confirmed that presupposition.

Only one email was withheld under the deliberative materials exception out of seven total. The equivalent of a privilege log is not required under APRA. Nevertheless, by identifying the existence of a single withheld email, the Governor's Office sustained its burden to this office that its actions were appropriate.

As for the separation of disclosable and nondisclosable material, Kenney's point is well-taken that APRA does require partitioning of records. Even so, there is no prohibition on withholding the entirety of a document if the totality of the record falls into an exception to disclosure. With emails especially, this is often the case. While this office has not reviewed the withheld material *in camera*, it has no reason to doubt the propriety of the invocation of the deliberative material exception.

### **3. Reasonable timeliness**

Undeniably, a requester should expect to receive some emails within a reasonable time if an agency accepts a request. Ind. Code § 5-14-3-3(b).

The term “reasonable time” is not defined by APRA; and thus, it falls to this office to make a determination on a case-by-case basis when a complaint challenges an agency’s timeliness. In doing so, this office considers the following factors: (1) the size of the public agency; (2) the size of the request; (3) the number of pending requests; (4) the complexity of the request; and (5) any other operational considerations or factor that may reasonably affect the public records process.

Anecdotally, in this office’s experience, the Governor’s Office has not deprioritized public access in any way during the pandemic. Arguably, through daily—now weekly—briefings, transparency has been well recognized by the administration. It has worked with the public access counselor on several issues to ensure compliance. To the extent Kenney’s request was delayed for several months, it was likely due to factors outside the Governor’s Office’s control. There is no indication, from the information provided, that the complainant was treated in a disparate manner from any other requester. As things begin to transition back to normal government operations, I have every confidence timelier responses will shift back to normalcy as well.

## **RECOMMENDATIONS**

Based on the foregoing, it is the opinion of this office that the Office of the Governor has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'L. Britt', with a stylized flourish at the end.

**Luke H. Britt**  
Public Access Counselor